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How Does the Law Change? The Case for Legal Research

Jeanne W. Halpern

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HOW DOES THE LAW CHANGE ?
The Case for Legal Research

Legal research, once synonymous with pretrial investigations, courtroom proceedings, and a rather slavish application of precedent, has, since the turn of the century, moved increasingly into university law schools. In so doing, legal research has expanded to include reform, innovation, and vigorous inquiries into the relation of law to the social forces that create it. In the satiric lithograph on the cover, "Les gens de justice" (courtesy of the University of Michigan Museum of Art), Honoré Daumier depicts 19th century lawyers and their "research" as pompous and self-serving. The frontispiece shows the William W. Cook Legal Research Building at the University Law School, where faculty scholars conduct legal research that is respected for its objectivity.

The small photographs appearing throughout this issue depict the exquisite architectural details of the University's Law Quadrangle, completed in 1933 in accordance with the wishes of the school's benefactor, William W. Cook.

Writer

Jeanne W. Halpern

Consultant

John H. Jackson

Designer

Cyril Barnes

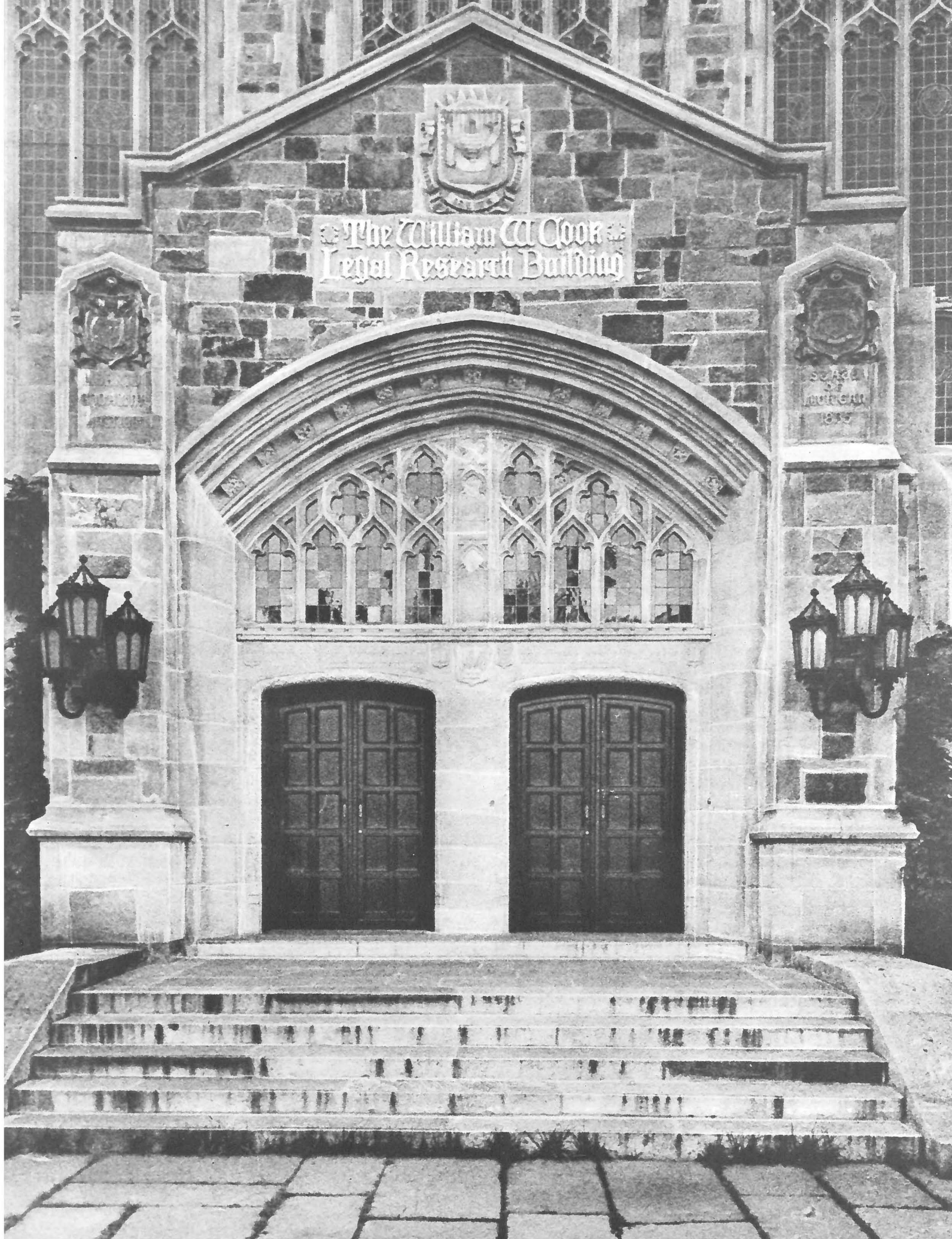
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The William W. Cook
Legal Research Building



HOW DOES THE LAW CHANGE?

"It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down vanished long since, and the rule simply persists from blind imitation of the past."

JUSTICE OLIVER WENDELL HOLMES



On January 8, 1962, the Supreme Court of the United States received a large manila envelope bearing the return address, "Clarence Earl Gideon, Prisoner No. 003286, Florida State Prison, P.O. Box 221, Raiford, Florida." The envelope contained two documents penciled in careful block letters asking the Supreme Court to hear Gideon's case. He was serving a five-year term for breaking and entering and claimed his conviction had violated the due-process clause of the Fourteenth Amendment to the Constitution. The trouble with Gideon's argument was that twenty years before, in the famous case of *Betts v. Brady*, the Supreme Court had rejected the contention that the due-process clause provided a flat guarantee of counsel in state criminal trials. *Betts v. Brady* required that a poor man prove himself a victim of "special circumstances"—among them illiteracy, youth, mental illness, complexity of charge, and conduct of the prosecutor or judge—to be entitled to a trial with a lawyer. But this mistake in Gideon's argument did not necessarily make his petition futile. Over the years, the Supreme Court had overruled its own decisions about one hundred times, and Gideon seemed to be calling for one of these great occasions in legal history. As it unfolded, this case was to touch on matters of constitutional interpretation, legal complexity, and human drama, each effectively documented in Anthony Lewis's book, *Gideon's Trumpet*. The Gideon case was also to illustrate how legal research, conducted in the quiet of university offices and law libraries, reverberates in courtrooms and Congressional cham-

bers, affecting and sometimes inspiring decisions that change our lives.

Legal research does not, of course, stand in the wings awaiting occasions of judicial and legislative urgency. It serves several explicit functions: clarifying the law through analysis of procedure, precedent, and doctrine; reforming old laws and creating new ones; providing a better understanding of how law operates in society; and furnishing materials for legal education. In each of these areas, the University of Michigan Law School has built a record of distinction, and specific examples of University research will be elaborated below. Since legal research conducted at universities also provides the setting and occasionally the scenario for judicial and legislative action, a case like *Gideon v. Cochran* dramatizes the effect of research on social change.

Legal research influenced two crucial decisions in the *Gideon* case: whether it would be heard, and how it would be decided. Professional and scholarly comment on *Betts v. Brady* had always been critical. Not long after the decision in 1942, the holding was severely criticized in a lengthy letter to the *New York Times* signed jointly by Benjamin V. Cohen, a noted New Deal lawyer, and Erwin N. Griswold, then a professor at Harvard Law School and later its Dean. In addition, Francis A. Allen, then a professor of law at the University of Chicago and later Dean of the University of Michigan Law School, had published a searching analysis of *Betts v. Brady* in the *DePaul Law Review* (1959). He documented preceding capital cases in which the Supreme Court had allowed the right to counsel for indigent

defendants and argued that non-capital cases, or those carrying small penalties, were often equally (if not more) difficult for a layman to defend. Other law review articles criticized the *Betts* doctrine, maintaining that those who could not afford a lawyer were being denied due process and equal protection under the law. One article concluded, after a painstaking analysis of the record in the *Betts* case itself, that *Betts* might well have been found innocent had a lawyer defended him. Having reviewed research of this kind as well as the documents prepared by Gideon, and having deliberated privately and in conference, the Supreme Court decided to hear Gideon's case. It requested explicitly that the counsel for both sides discuss whether *Betts v. Brady* should be reconsidered.

Bruce Robert Jacob, who represented the state of Florida, argued to uphold *Betts*, contending that it protected the rights of state courts. Abe Fortas, representing Gideon, urged the court to scrap *Betts*, using data from a law review article as one of the main pillars in his argument. When Fortas was preparing Gideon's case, Yale Kamisar, then a professor at the University of Minnesota Law School and now at Michigan, was completing an empirical research article on the right to counsel. His research had involved hundreds of questionnaires, letters, and phone calls to state attorneys general, judges, prosecutors, lawyers, and public defenders in an effort to discover how right to counsel for the indigent was actually being handled by the states. He found that thirty-seven states provided counsel in all felony cases, and that in eight other states, the practice of appointing counsel in serious cases had developed—at least in the larger cities—

without benefit of any statute or court rule. The five remaining states, which only assigned counsel to the poor in capital cases such as murder or rape, were Alabama, Florida, Mississippi, North Carolina, and South Carolina. During one of his phone interviews, Kamisar learned that his research could be of use in the *Gideon* case. He phoned Fortas's office and provided the factual material on which Fortas based his argument. Fortas contended that since most states did, in fact, appoint counsel for poor defendants, the *Betts* rule, with its uncertain standard of "special circumstances," was "federal supervision over the state courts in its most noxious form." On March 18, 1963, the court overruled *Betts* and granted Gideon a new trial with legal defense.

At the very time the Supreme Court was considering whether to overrule *Betts*, Attorney General Robert F. Kennedy had appointed a committee of scholars, practicing lawyers, and state and federal judges to review the possibility of establishing a system for providing counsel for defendants in federal courts. The committee chairman was Professor Francis A. Allen, who had published the criticism of *Betts*. It was not unusual then, nor is it now, for legal scholars to become involved in public affairs. Not only do their professional studies lead them to testify before Congressional committees, draft legislation, and act as consultants, editors, and committee members, but they are often called to Washington to serve in government. (More than seven pages of single-spaced type in a current Dean's report are devoted to the public service activities of members of the University's Law School.) In 1963, Allen's committee proposed, among other items, that every federal district

court be required to choose one of four well-elaborated systems, including the public defender system, for representation of needy defendants. The week before the *Gideon* decision was reached, President Kennedy submitted the Allen Committee's measure to Congress as the proposed Criminal Justice Act of 1963. Although the Senate acted promptly, the House did not pass the Bill until January 14, 1964, just a year after Fortas began pleading *Gideon's* case before the Court. As the Criminal Justice Act of 1964, it became the first historic step by Congress to assist in the defense of the indigent.



Although many professionals agree that law review literature has been the single most important factor in the development of public law, at least since the New Deal era, no one would argue that law review articles alone had convinced the Supreme Court of the United States to hear *Gideon's* case. Nor could one argue that, of the hundreds of significant Supreme Court decisions over the years, *Betts v. Brady* warranted extraordinary attention. Rather, the reaction against *Betts v. Brady* as well as the acceptance of the *Gideon* case for review were two barometers of contemporary social pressure, as inevitable in 1962 as the *Brown v. Board of Education* case that heralded public school desegregation in 1954. By then the long-standing questions of civil liberties and criminal justice had become major issues. In the 1960's, due process and equal protection, promised to all in the Constitution, were being demanded by all—white, black, rich, and poor. So far as the law was concerned, the responses were felt in the courts, flooded with civil rights cases and criminal appeals, and in the federal and state legislatures, which prepared and passed statutes, albeit laggardly in some cases, in response to new national stresses. So far as legal research was concerned, doctrinal studies analyzing and rationalizing the statutes of existing law gave way to greater emphasis on methods of getting at emerging problems. The direction and subject matter of legal research had been influenced by the same set of social conditions that had brought *Gideon's* case to the Supreme Court and the Criminal Justice Act of 1964 through Congress. One did not cause the other, but all three—judicial, legislative, and legal research activities—coincided to implement social change.

Why then is legal research, immersed as it seems to be in the controversies of the times, often called disinterested investigation? Because it is not mustered to defend a client or, generally, to argue before the bench, but stems instead from the curiosity of an individual or group of researchers. Such research is, however, as embedded in the society it serves as engineering research, and with similar surges now in one direction, now in another. As issues have moved to the forefront of international, national, state, or group consciousness

—issues such as world trade, probate law, drug addiction, environmental protection, women's rights—legal specialists have found their interests coincident. They have conducted research and prepared courses reflecting these interests.

Even this, however, is a relatively new phenomenon. Legal research at universities, like space biology and computer science, is a product of the twentieth century. Earlier, for nearly a hundred years after the adoption of the Federal Constitution, American law had remained relatively static. "It was assumed to be based upon fundamental and immutable principles," explained Henry M. Bates, Dean of the Michigan Law School from 1910 to 1939, "and it was the duty of the courts only to declare the law in relation to cases pending before them." Except for the work of a few masterful judges and legal scholars, such as Marshall, Kent, Story, Calhoun, Webster, and Cooley, the courts applied precedent somewhat slavishly until the end of the century, and law was studied and taught dogmatically. Then, near the turn of the century, Justice Oliver Wendell Holmes and Roscoe Pound (Dean, Harvard Law School, 1916–1936) aroused the country to a fresh and more flexible attitude toward the law and legal scholarship. Justice Harlan F. Stone of the U. S. Supreme Court explained this transformation in legal research when he spoke at the dedication ceremonies of the Michigan Law Quadrangle in 1934. "For a generation they (legal scholars) contented themselves with the necessary work of analysis, clarification, and statement of legal doctrine. More recently, with penetrating insight, they have expanded their inquiries to embrace the relation of law to the social forces which create it, and which in turn it is designed to control." It is doubtful that even Stone, from his vantage point of the Depression, could have anticipated the full extent to which legal research in universities would, in the coming decades, grow to embrace not only analytical and sociological investigation, but also legislative, judicial, and administrative reform and innovation. The development of legal research came to depend more and more on the gathering of contemporary as well as historical research materials. This, in turn, clustered preeminent legal scholars at research centers, both in government and at well-endowed universities.



The University of Michigan attracted scholars, including those who had been involved in the *Gideon* case, from throughout the United States because of its emphasis on legal research. The distinction of the Law School was assured by the benefaction of an alumnus, William W. Cook. Born in 1858, Mr. Cook received his bachelor's degree from the University in 1880 and was graduated from the Law School in 1882. He practiced law successfully in New York City, dealing almost exclusively with corporate organization and finance. During his lifetime and under his

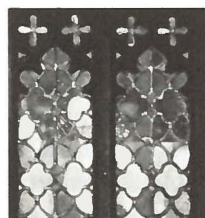
will, he gave the University nearly sixteen million dollars, thus becoming its most generous private benefactor. His gifts made possible the foundation of a chair in American Institutions, the building of the Martha Cook dormitory for women, and the entire Law Quadrangle: the Lawyers' Club (1925), the John P. Cook Dormitory (1930), the Legal Research Building (1931), and Hutchins Hall (1933). Cook also stipulated that a certain proportion of the Cook Endowment Income be used exclusively for research. Having observed law in action during most of his professional career, he considered research an immensely significant part of law school activity. This trust, in conjunction with grants from federal and state governments, foundations, legal organizations, and private sources, has allowed legal research at the University to flourish.

Legal research depends largely upon the holdings of the Law Library, which in size and completeness are exceeded by few collections in the nation. Of the more than 400,000 volumes in the Law Library, about sixty percent are serial publications, including case reports, legal periodicals, annual volumes of legislation, and nearly every important primary authority in the world. Primary publications comprise statutory materials such as constitutions, laws, treaties, and regulations. Considering that such documents date back to the earliest example of legal writing, the Code of Hammurabi, and go through the most recent Supreme Court decisions, it is both an enormous and indispensable collection. While the non-serial collection also contains primary authorities, it is largely composed of secondary materials or writings about the law. Faculty and students use both primary and secondary sources in research, for they provide the most current case decisions and legislative documents as well as a complete range of legal opinion and interpretation. About 10,000 volumes are added to the Library collection each year in response to general needs, special faculty research pursuits, and the cosmopolitan interests of the students.

While the written word remains the standard currency of legal scholarship, changes are occurring that may prove as decisive to research as the change from the apprentice system to the law school class did to legal education. One such change is being brought about by computers. Although the computer is as yet a very small part of the scholar's activity, a few professors and students are developing systems of computer-based legal research and computer-aided instruction. A second change in legal research is the Law School's encouragement of interdisciplinary studies. Grants from the Cook income, for example, allow young faculty members a semester of research leave at full pay after they have taught six semesters at the University, supplementing the sabbatical policy. Since this is a non-restrictive grant, a scholar may study languages, social sciences, or pursue his own legal research. The Law School also includes on its faculty persons who are acquiring doctorates in other fields such as sociology

and philosophy, as well as professors from other disciplines who teach in the Law School. On the regular Law School faculty are Professor Andrew S. Watson, of the Psychiatry Department, Professor Angus Campbell, Director of the Institute for Social Research, Professor Peter O. Steiner, of the Economics Department, and Professor Layman E. Allen, of the Mental Health Research Institute. Not only do these faculty members teach in the Law School, but they often conduct research and act as in-house consultants to the other members of the Law School faculty.

Most of the 56 faculty members in the Law School are engaged in research projects. Professor John H. Jackson, Director of Legal Research at the University Law School, recently explained that although such projects are extremely varied, they can be roughly grouped in four general categories: (1) writing treatises, law review articles, or other professional books that analyze a specific aspect of the law or its operation and often make recommendations for change; (2) participating in the drafting of statutes, codes, and legislation which change the present law or develop new law that responds to current social complexities; (3) developing a better understanding of the law in society through empirical studies; and (4) preparing casebooks and teaching materials. Although different specialists group types of legal research in different ways, it remains a peculiarly individual pursuit, varying as much with the scholar's personality as it does with the subject matter and the times. The following examples of current research have been selected to demonstrate the range of scholarly investigation at the University of Michigan Law School.



ANALYZING THE LAW: Legal analysis is designed to provide a clearer perception of the content and impact of a particular body of law and to suggest directions for change. It may investigate legal literature, statutes, and court decisions involving an important issue, as many of the law review articles pertaining to the Supreme Court decision on *Betts v. Brady* did, or it may review procedural, administrative, or legislative ideas and practices. One aim usually is to clarify an area of law, making it more comprehensible and useful to lawyers and judges.

The machinery by which the courts apply the law and resolve disputes is one such area of study. In 1968, Chief Justice Earl Warren pointed out that judicial administration "has been almost totally neglected by the law schools, by the bar, and by the courts of the land. As long as people cannot get their rights enforced, it makes little difference whether substantive law is good or bad." An attempt to remedy the problem is *Federal Practice and Procedure: Civil* by Charles Alan Wright of the University of Texas Law School and Arthur R. Miller of the University of Michigan Law School. When

completed it will be a treatise of at least ten volumes elaborating, organizing, and explaining the operation of the United States courts.

The Federal Rules of Civil Procedure and a number of federal statutes determine how a civil case is to be handled by a court from its initiation through its final appeal. Thus a careful analysis and organization of the material relating to these rules and statutes would expedite the movement of cases. Federal practice has not always been well organized. The rules of civil procedure did not come into existence until 1938 and have been revised frequently since then; those for criminal and appellate procedure followed. Professors Wright and Miller undertook the new treatise on federal civil practice and procedure to provide an analysis of the rules, the amendments, and the decisions by the federal courts. A new work on this subject was thought desirable because of the tremendous increase in litigation in the federal courts following the second world war. Such fields as antitrust, securities regulation, race relations, reapportionment, environmental preservation, and consumer protection have caused Americans to flock to the federal courts in unprecedented numbers. In meeting the challenges presented by these new types of cases, the courts have been confronted with a wide spectrum of new procedural problems. The Wright and Miller work is designed to provide a structured discussion of civil procedure in the federal courts that takes account of the realities of modern litigation. In addition to civil volumes there will be units on criminal procedure, appellate practice, and the rules of evidence.

The treatise replaces William W. Barron's and Judge Alexander Holtzoff's comprehensive treatment of the subject in 1950. The new treatise attempts not only to analyze the rules of procedure as they are currently being construed, but to examine those issues on which the courts have disagreed and to anticipate problems likely to arise in the future.

To enable judges, court officials, lawyers, and researchers to handle cases more efficiently, the rules are stated, analyzed, and documented as simply as possible by case decisions. The treatise carefully elaborates each rule by giving its history and purpose, its subject matter, how it is applied by the courts, its traditional use, and the potential areas of difficulty in its operation. Both case law and secondary materials are documented so that practitioners may pursue the subject further when necessary.

To help organize the enormous amount of legal information that has been generated by the courts since the rules became effective, Miller employs several law students each year. They work with him to analyze every federal case decided since 1938, and often must go back to earlier precedents—occasionally to the English common law—to explain the theory and objectives of a particular rule. Each case is dissected in terms of its relation to the procedures involved. Miller and his staff then catalogue the materials relating to

each rule, all problems arising under it, and all cases decided under it, as well as problems that arose which were not covered by existing rules, or that were difficult because of such matters as jurisdiction between federal and state courts. The volumes that result assist practitioners in making their way through the rules and precedents of practice before the federal courts and the state courts of the more than forty states that follow some or all of federal procedure.

A second and unusual example of scholarly analysis of the law is a volume by Professor John H. Jackson. Although rigorous legal analysis is not often used in the tangle of international agreements and relationships, Jackson applied such a technique to international trade agreements in his treatise entitled *World Trade and the Law of GATT*. GATT is an international treaty, the General Agreement on Tariffs and Trade, designed to govern the permissible activities of the seventy-six member governments in regulating international trade. Although GATT has grown into an almost incomprehensible maze of legal machinery since its beginning in 1947, it has been useful in preventing trade wars and other damaging international economic practices. Because of GATT negotiations on trade and tariff—the most recent and most fruitful was the Kennedy Round from 1962 to 1967—American consumers can purchase a much wider variety of foreign products such as German wines and Japanese motorcycles at more reasonable prices. Professor Jackson's aim was to organize and clarify the twenty-year accretion of GATT agreements and precedents so as to make the constitutional law of GATT, the obligations of members, and the exceptions to these obligations, understandable. While doing this, Jackson acted as legal consultant to the GATT secretariat in Geneva in 1965, and to various United States government agencies. In analyzing the relationships between economic and legal issues, and in providing a path through GATT materials, Jackson has, in effect, enabled government officials, lawyers, and legal scholars to comprehend not only the potential pitfalls and needs for reform (e.g., more help for developing countries), but also the possibilities for and limitations on lasting international trade cooperation.



REFORMING THE LAW: A second type of legal research deals with reform, or the effort to put sense and order into an established but sometimes confused field. Although administrative and judicial reform receives a good deal of attention from members of the faculty, the majority of continuing research efforts at the Law School pertain to legislative reform. Generally speaking, these include endeavors to identify means by which conflicts between people, or between private interests and the government, can be solved, minimized, or avoided. Sometimes, legislative reform aims to develop legal devices by which people can help

themselves, and to reduce or disentangle legal accumulations from earlier times.

One example is the reform of probate, or the way individuals pass on property at death. Two years before Norman Dacey struck a raw nerve in the legal profession by writing *How To Avoid Probate* (1965), a committee of professors from various universities had formed to conduct research and write a Uniform Probate Code (UPC) for the United States. The UPC project was initiated by The National Conference of Commissioners of Uniform State Laws, an 80-year-old organization of official representatives from each state who coordinate proposals for new state legislation in cooperation with the American Bar Association. The Code, whose chief reporter was Professor Richard V. Wellman of the University's Law School, was to be the legal community's attempt to mend notoriously deficient probate law by reshaping and reshifting old laws from various states into a uniform law.

As finally passed by the National Conference of Commissioners on Uniform State Laws and accepted by the American Bar Association in 1969, the Code would enable individuals to pass on property at death but to avoid, if they wished, contact with courts and lawyers. It would greatly reduce the necessity for about 75% of the population, whose affairs do not involve high values or family complication, to make wills or otherwise engage in estate planning. Also, the Code would reorder post-death procedures so that survivors might collect inheritances with much less delay, expense, and frustration than is typical at present. Under the Code, inheritors may avoid most legal assistance in collecting inheritance if willing to assume some associated risks and responsibilities. In cases where lawyers and courts become involved, the Code should make the business relationships between clients and estate lawyers more understandable and manageable. The Code also promises relief for those concerned with money management for minors or adults who cannot handle their own affairs. And, for citizens in general, the Code would mean a system of property succession that does not inflate the cost to taxpayers of court maintenance or leave people with a nagging suspicion that public, probate agencies exist more to hurt than to help the public.

It remains to be seen whether this move by the legal profession that began long before avoiding probate court became a national crusade will ever become law. It is not law now because legislation governing individual or family relationships is not the business of the federal government and must therefore be enacted by state legislatures. By initiating research on the Code, however, state representatives, who are members of the National Conference of Commissioners on Uniform State Laws, sought to begin to untangle the existing mass of state probate law and bring it in line with contemporary social realities. The UPC may now be enacted or become law in any state, or it can serve as a model for state legislative reform, somewhat freeing revision

from local political interests. Thus, even if it falls short of being generally accepted—and the Code is controversial—it will help conscientious legislators see the importance of critical details which have long been buried under a mountain of probate procedure.

How Professor Wellman and the committee of reporters from other universities mined this mountain of inherited principle to prepare the Uniform Probate Code gives some insight into the procedures of legal research aimed at reform. Because most human problems are obvious long before statistics can verify them, the reporters first gathered data in the form of opinions from lawyers, law teachers, and other professionals throughout the country by means of interviews, discussions, and questionnaires. These contacts served as a weathervane, indicating the direction reform should take. The documentary bases of the UPC effort were the Model Probate Code of 1946, a legislative model accompanied by meticulous analysis of probate statutes, research notes, and articles published by the University of Michigan Law School in 1946, criticisms of the 1946 Model Code, and other suggestions for probate law improvement that had since appeared in the legal literature. In addition, the committee examined comparative studies of law, such as Professor William F. Fratcher's "Fiduciary Administration in England" (*N. Y. U. Law Review*, Jan. 1965), and some recently collected statistics based on studies of probate files in Cleveland and Chicago. Some UPC reporters also had served on probate reform groups within their state bar associations, gaining front-line experience in the politics of legislative reform. The committee also benefited from a steady return of reactions from individuals and groups such as the Chicago Bar Association Study Committee, which examined portions of one or more of the six preliminary drafts that preceded the approved version.

Although Professor Wellman, as chairman, articulated the goals of the project and formulated some of the measures by which the goals were achieved, he characterizes his principal contribution as "administrative," meaning that he sought to coordinate the work of many others. In the process, he acted as author, editor-in-chief, recording secretary, draftsman, and proofreader for various drafts. He received financial support from the National Conference on Commissioners of Uniform State Laws, the American Bar Foundation, and the State Bar of Michigan. In addition to his other duties, his involvement included dozens of speeches and appearances on radio and television. He also worked actively on developing a proposed new Michigan Probate Code now being studied by the Michigan legislature, and has written extensively on the subject of probate for various law reviews, magazines, and journals. He has used portions of the subject matter covered in the Code in three courses in the Law School, and has organized seminars around the UPC, providing useful opportunities for original, independent work by students.



CREATING NEW LAW: Legal institutions have developed for thousands of years with different kinds of issues capturing public attention at different times. Since the eighteenth century in the United States, when the Bill of Rights enumerated the basic civil liberties of

individuals, laws have consistently been devised to respond to developments requiring new legal approaches for the protection of public and private rights. One important function of legal research has been its attempt to shape such developments by raising questions that challenge traditional views, whether they be on space, privacy, automobiles, drugs, or the environment. Thus it has always fallen to some members of the legal profession to be especially sensitive to nuances of change.

One such person is Joseph L. Sax, whose research in environmental law began nearly a decade ago and has since produced a variety of law review articles, books, popular magazine pieces, and legislation. Sax had begun teaching law in Boulder, Colorado, where many of the traditional courses were related to mineral, gas, and water resources. In 1965, Pruett Press of Boulder published his *Water: Cases and Commentary*, a casebook of western water law. That year, Sax came to the University of Michigan, introducing the Law School's first seminar in Environmental Law. In 1968, Sax's *Water Law, Planning and Policy* was published by Bobbs-Merrill. This text departed from the traditional case and commentary approach to emphasize the factual background of several contemporary problems in water resource management. It marked a move not only from regional to national thinking on the subject, but from the specific legal view to his conviction that the legal issues of water resources cannot be isolated from economic, technical, and political considerations. He reprinted cases only where absolutely necessary, infusing the text with current economic, historic, and political material. At about this time, public interest in the environment reached a crest. Sax began to develop legislation that could provide practical implementation for his ideas. By pursuing the problem from this point of view, he became increasingly aware not only of the public concern for the environment, but of the need to respond with legal measures. He learned more about specific aspects of the problem when he worked with the Environmental Defense Fund in the 1968 case that challenged the use of DDT in Michigan. In 1969, the Western Michigan Environmental Action Council retained Sax to draft a model environmental quality bill for Michigan, the provisions of which were incorporated into House Bill 3055 that was passed into Michigan law in July, 1970. This law opened a new public right to individuals by allowing them to sue to protect public environmental interests.

Sax's involvement in various aspects of the environmental crusade continued. He developed a large first-year course in

environmental law and gave talks and lectures throughout the University and the state. In Washington, he became a consultant to the Senate's Public Works Committee and a member of the Legal Advisory Commission of the President's Environmental Quality Council, both concerned with developing legislation or policy for environmental protection. In addition, he wrote law review articles such as "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention" (*Michigan Law Review*, Jan. 1970), articles for popular magazines such as the *Saturday Review*, and a book, recently published by Alfred F. Knopf, entitled *Defending the Environment*.

The motivation behind Sax's research is his view that the environment—natural beauty as well as natural resources—is a legal right we all hold in common. He states that the nation needs a rational system of law so that lawyers and judges do not have to find obscure statutes that defendants have violated (the Alaska oil suit challenge depended on the width of a highway right-of-way) to protect the environment. Sax's research traces the public right to the environment from Roman laws, under which "perpetual use of common properties was dedicated to the public," to the present. In England, he points out, the law developed that "the ownership of the shore has been settled in favor of the King: but . . . has been immemorially liable to certain general rights of egress and regress, for fishing, trading, and other uses claimed . . . by his subjects." American law adapted this general idea of trusteeship, but rarely applied it to any but a few sorts of public properties such as shorelands and parks. On the basis of a careful examination of judicial precedent in the United States, Sax contends that the idea of a public trusteeship rests upon three related principles. First, that certain interests, such as the air and the sea, have such importance to the citizenry as a whole that it would be unwise to make them the subject of private ownership. Second, that these interests partake so much of the bounty of nature, rather than of individual enterprise, that they should be made freely available to the entire citizenry without regard to economic status. And finally, that it is a principal purpose of government to promote the interest of the general public rather than to redistribute public good from broad public uses to restricted private benefit. Had such principles been taken into account, the ill-fated decision to lease public lands off the coast of Santa Barbara, California, for commercial oil production might never have been made over the strong objections of local citizens.

Sax states that arming the ordinary citizen with legal power, which the Michigan law does, will not itself restore our air, water, and land resources, nor will it supplant the need for strong action on other fronts. Administrative regulation will go on, legislative standards will be set, task forces and advisory panels will continue to engage in both long-range planning and some degree of specific dispute management. Courts serve only to supplement and invigorate these

activities by making clear that there is another avenue of redress for the citizen. Thus, says Sax, it is essential to understand that litigation is not antithetical to planning. Indeed, a principal function of the lawsuit is to promote intelligent planning. From this point of view, legal research as it advances innovative legislation, shapes both planning and public policy.



EXAMINING THE LAW'S EFFECT:

Does a law have its intended effects or can informal procedures circumvent the substance while holding to the letter of the law? How can administrative procedures be structured to serve rather than subvert the intent of the law? Such

problems concern not only the lawyer, legislator, judge, and legal scholar, but also the sociologist interested in determining the actual effects of the law on society. Much socio-legal research attempts to discover the extent to which legal prescriptions succeed in channeling behavior. One example is Professor Roger C. Crampton's work for the University's Highway Safety Research Institute on the legal control of the drinking driver, and general interrelationships between driver behavior and legal sanctions. Socio-legal research also analyzes how the legal system is articulated with other systems of society, describing relationships between the law and psychiatry, the law and engineering technology, the law and economics. Empirical socio-legal research techniques permit investigators to zero in on a population or a segment of a population, and measure whether certain procedures do, indeed, produce more or less of a desired effect.

Richard Lempert, Assistant Professor of Law, is conducting such an inquiry to meet requirements for a Ph.D. in Sociology. His thesis, "A Study of Eviction from Public Housing," reviews both legal and sociological implications of eviction procedures in Honolulu, Hawaii, between 1959 and 1968. As a lawyer, he is trying to discover how the law is being circumvented or implemented through informal procedures. As a sociologist, he is interested in the systemic framework that allows or encourages either possibility.

Throughout the nation, the movement in welfare law has been to provide improved protection, often in the form of increased procedural due process, to welfare recipients. In public housing, for example, a tenant in most states could be evicted for any or no reason upon the giving of thirty days notice; since February 1967, however, a directive from the Department of Housing and Urban Development requires public housing managers to explain to a tenant the specific charge against him. More recent developments suggest that the tenant then has a right not only to answer charges, but to summon witnesses and use counsel. In Honolulu, Hawaii, tenants have had such rights for more than twelve years. For the last ten, they have been able to protest eviction orders before a board which has no other involvement in

public housing. Lempert's research examines the effect of the Hawaiian procedures on the eviction process.

When the Hawaiian Housing Authority wishes to terminate a tenancy, it is required by statute to summon the tenant to a hearing before an eviction board and present evidence to that board supporting its desire to evict. The tenant has the opportunity to present evidence contrary to the board's contentions and, in the case of an admitted default, to explain the circumstances of the default and ask for clemency. Even if the board finds that the authority has presented valid evidence which justifies an eviction action, it may refuse to evict if it can get the tenant to promise that he will correct the faults which led to the action and if it believes the tenant's promises. Only if the eviction board decides that eviction is warranted can the authority ask the assistance of the local court in removing the tenant who refuses to vacate.

Before 1960, the HHA eviction board was composed of three members of the local housing authority: the assistant executive director, the comptroller, and the project engineer. After 1960, the board grew to five members appointed by the Governor from the larger community in an effort to include on it some individuals who would have special sympathy or insight into the problems of the poor. The membership of the board when Lempert conducted his study included a Buddhist minister, a labor union official, a local businessman, a welfare department official, and a man recommended by the local community action program of the Office of Economic Opportunity. The housing authority appears regularly before the board, but does not participate in the board's discussions and has no official representative on it.

Lempert's investigation indicated that although the law in Honolulu gave the same due process protection before 1960 as after, the rate of eviction changed markedly with the change in the composition of the review board. His analysis showed that whereas two-thirds of the cases appearing before the internal board were evicted, only one third of the cases heard by the independent board was evicted. Why? Studying the matter from a sociological perspective called role theory, Lempert surmised that the internal board members (those connected with the housing authority) were by occupation and personal contact generally sympathetic to the efforts of public housing managers. They would therefore be more likely to evict for non-payment of rent or other offenses without compunction. The independent board, on the other hand, always contained several people whose occupational roles inclined them to be sympathetic toward the tenant population. These external board members would be far more likely to ask why a tenant was remiss in rent payments, and to decide more leniently on his prospects of repaying rent, thus decreasing the number of final evictions. As far as the legal aspects of Lempert's investigations are concerned, the study suggests that if the substantive aims of welfare-tenant legislation are to give the benefit of a doubt

to tenants and to reduce the chance they will be evicted when they can be “saved,” then the law must build in informal as well as formal safeguards. Although many ways to subvert the law will remain—managers can and do, for example, press tenants to pay up or leave without notifying them clearly of their right to an impartial hearing—the lawyer or legislator who is aware of the sociological implications of a given system can draft statutes that are less easily circumvented.

One distinctive feature of Lempert’s research was its frame of reference. Approximately ninety percent of his information was drawn from interview and archival material, and very little came from lawyers or law books. Those interviewed included project managers, housing authority staff, review board members, and others in Honolulu who had connection with the public housing eviction process between 1957 and 1968. So far as documentary information was concerned, Lempert examined the archives of the Hawaiian Housing Authority, looking through the records of all tenants brought before the eviction boards, and went through the court decisions, law review articles, memoranda, and correspondence between local offices and the federal Public Housing Authority and Department of Housing and Urban Development. Major sociological material included works on role theory and the sociology of organizations. From this skein of information, he analyzed why certain laws and administrative procedures have certain effects. In the eviction board procedures he found, for example, that the provision of an independent review board resulted in many tenants being given a second chance to pay their rent and that the overwhelming majority of these tenants did, in fact, pay, reducing both the eviction rate and the personal anxiety caused by eviction.



TEACHING THE LAW: When a professor’s research coincides with a current legal and social concern, and colleagues and students show interest in learning more about it, he generally develops a seminar in the subject. Because he is exploring new territory, he often finds it

necessary to prepare original teaching materials. These usually begin as class notes and, if the class continues and the professor perseveres, grow into casebooks. Casebooks are legal textbooks that contain cases, annotations, and occasionally historical, political, and economic perspectives as the subject requires. Casebooks often develop as a field of study grows in the law curriculum.

After the landmark *Gideon* case, for example, and another decided on the same day by the Supreme Court—in *Douglas v. California*, the Court held that a poor man had the right to counsel in an appeal case—interest surged in the direction of criminal law. In 1963, when the *Gideon* and *Douglas* cases were decided, the Law School offered no regularly scheduled course in criminal procedure; last year, it

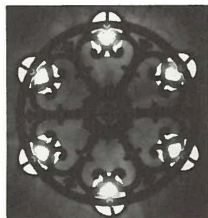
offered two different courses in criminal procedure taken by 150 students each, plus a variety of seminars. Since Professor Yale Kamisar’s research had focused on criminal law, and since there were no appropriate course materials in criminal procedure, he began *Modern Criminal Procedure* in 1963, and has, over the years, developed the casebook with various co-authors including Professor Jerold Israel. In 1964, the volume was published as an experimental paperback of 250 pages; in 1965, it expanded to 565; in 1966, to 880; in 1969, to 1456, with a 275-page supplement added in 1970. The field of criminal law was expanding, and only by following the published legal reports of each case and making extensive use of the literature stimulated by new developments was it possible to update the text rapidly enough to keep the course, and the lawyers it was designed to educate, current.

Although the earlier editions dealt mainly with the constitutional dimensions of criminal procedure, the 1969 edition contains many chapters that are primarily non-constitutional in thrust—the decision whether to prosecute, preliminary hearings, jurisdiction and venue, joinder and severance of counts and parties, and post-trial motions and appeals. Two of the new chapters are particularly timely. “General Reflections on the Police, the Courts, and the Criminal Process” examines tensions between police and racial minorities, various means of controlling and influencing police power and discretion, and the impetus for (and resistance to) “judicializing” the criminal process. “The Administration of Justice in the Wake of Civil Disorders” considers riot curfews, mass arrests and general searches, bail and “preventive detention,” and the role of defense lawyers, prosecutors, and judges generally in times of crisis. As in the previous editions, the authors have greatly enriched the case materials with extensive extracts from illuminating books, reports, articles, and speeches. Because of the current concern over the need for legislative attention to problems in the administration of criminal justice, they have included proposals growing out of such recent law reform efforts as the American Bar Association’s Standards for Criminal Justice and the American Law Institute’s Model Code of Pre-Arrest Procedure.

In their efforts to make maximum use of the most recent writings in the field, the authors investigated every report or rumor of forthcoming articles, books, and studies pertaining to topics in criminal procedure. Thus, in preparing the new edition they were able to study and select extracts from manuscripts or galleys of many unpublished works. Much of the material in the chapter on civil disorders, for example, is based on a *University of Chicago Law Review* study of the April 1968 Chicago disorder and various reports by the National Commission on Causes and Prevention of Violence and the District of Columbia Committee on Administration of Justice under Emergency Conditions. None of these appeared in print until weeks after extensive extracts from them were “reprinted” in *Modern Criminal Procedure*.

While the latest edition (March 1969) was being printed,

the authors deleted several "old" materials and replaced them with cases just then handed down by the United States Supreme Court. Thus they managed to include all the significant criminal procedure cases of the 1968-69 term except three handed down the last day of the term, and these more recent decisions appear in the 1970 supplement. The texts are used at Michigan and universities throughout the country that have added or developed courses in criminal law and procedure.



Nearly forty courses or seminars have been added to the Law School curriculum in the last few years, reflecting both the research pursuits of the staff and contemporary social problems. They include an extremely wide variety of subjects: for instance, African Legal Developments, Race Relations Law, Communist Law, Science and Law, and Problems of Public Education. The course that most represents change in the law curriculum, however, is based less on research than on the practical necessity of providing and teaching students about legal aid for the poor. In the spring of 1969, the faculty approved a course in Clinical Law on an experimental basis and has substantially expanded it since. Professor James J. White, who had previously coordinated volunteer student participation in the Washtenaw County Legal Aid Clinic, developed the course which allows students practical experience in court cases. All cases for class work, including divorce action, landlord-tenant controversies, bankruptcy action, welfare and social security, consumer credit, and criminal action, come from the caseload of the Clinic. By developing cases under professional supervision and working in behalf of indigent clients, students learn standards of professional behavior and interviewing skills while gaining trial practice. "It appears that clinical law practiced in behalf of the poor," said Professor White in a recent speech at the University of Chicago, "will occupy the position in the law school universe of the seventies which was held by international and comparative law in the sixties and late fifties."

Research pursuits of the faculty often rejuvenate established courses. In the field of probate law, for example, Professor Wellman incorporated many of the most pressing problems in his UPC project into large sections and seminars, encouraging his students to develop solutions and, in so doing, sharpen their awareness of the changing nature of the law. Similarly, in his course on procedure, Professor Miller examined the Spock and Chicago 7 trials from a procedural point of view. Corporation Law courses now include a background in black capitalism. In such ways does change, which came ponderously to law school curricula in the past, now grow naturally from the faculty's research vitality.

Built into the curriculum, also, is a great deal of specific research training. First-year students may take the Case

Club program in which every student starts with a problem, learns to use the legal research tools of the library, and prepares two oral arguments or briefs. Nearly all second-year students are required to take "Problems and Research," a course providing students with experience in preparing memoranda and other research documents. Since every student is required to take at least one seminar as a condition of graduation, all students prepare a fairly substantial research paper as part of their course work. Students who wish may select an area for supervised investigation of a special topic.

Extracurricular activities in law schools are often so research oriented as to be at least as rigorous as course work. Foremost are the law reviews, the main medium of scholastic exchange, which are run entirely by students. Law reviews have come under attack in recent years as an elitist institution, or, as some call it, "the perfect aristocracy." For a law review takes the ablest students in a difficult school and imposes on them heavy burdens of work and time. Law review editors at the major law schools write articles or solicit them from judges, lawyers, faculty members, and scholars in other fields. The staff edits those accepted from outside sources, sometimes riling the author, often improving the manuscript. Becoming an editor on the *Michigan Law Review* follows a set pattern. The top twenty or thirty students who have performed best in their first-year classes are selected by the editors to be second-year members of the *Law Review*. Working very closely with third-year students, often on a line-by-line basis, they write notes, comments, and articles of between five and fifty printed pages on current legal problems. (Occasionally they request faculty consultation, but are quite free to disregard it if they choose.) About half of the *Law Review* is given over to student articles. Those second-year students who perform most successfully are then chosen by the current board of editors to manage the *Law Review* as third-year students. Generations of law students have claimed that their most useful and challenging academic experience has been editing the *Law Review*.

Because there are so many capable students at the Law School and because so much current legal scholarship is being produced, Michigan students publish another law journal, *Prospectus*, that is run very much like the *Law Review*. In addition to research training on publications, students also have an opportunity to compete in the Campbell Competition, a moot court contest requiring extensive legal research, decided by a Justice of the United States Supreme Court, other judges, the Dean of the Law School, and faculty members. There are a host of other research-related activities, such as the Environmental Law Society, the Milan Prison program in which students provide legal service to inmates, and the Legislative Aid Bureau or LAB. LAB is a group of junior and senior law students interested in solving legislative problems. Independently financed through non-tax dollars, LAB responds to requests from governmental units to research problems and devise legislation or recommenda-

tions. LAB, for example, drew up the gun-control ordinance for Ann Arbor and a bill regulating the distribution of abandoned property in Grand Rapids. Over the summer of 1970, LAB members prepared a 475-page handbook, "Legislative Approaches to the Problems of the Elderly," for the National Council for Senior Citizens, with funding from the Office of Economic Opportunity.

The best-known student research group in the Law School is the Legislative Research Center, directed by Professor William J. Pierce. The Center, created in 1950, is an organization of graduate students, those planning to enter the teaching branch of the profession, who do their thesis research within the framework of a specific project. Pierce selects a project related to an important aspect of state government or law. In 1963, for instance, the state of Michigan adopted its new Constitution. In framing the document, the Constitutional Convention had stipulated that all law revision consonant with the new Constitution be completed within two years of passage. This implied a virtual overhaul of state legislative, judicial, and executive procedures, including such changes as a reorganization of 138 executive agencies into twenty or less departments. Pierce, who was special counsel to the Joint Committee on Implementation of the new Constitution, worked closely with the University's Legislative Research Center and the state government to see that all state statutes were in harmony with the revised Constitution. Although the Legislature made minor changes, this enormous body of state law was modernized largely by the Legislative Research Center.

The effects of legal research spread farther still, and often touch the public in less direct ways. In "A Quest for Certainty," for example, the U-M Television Center produced a twenty-program series, based in part on legal research at the University, which probed the nature and values of the American legal system. Serving as host and moderator, Professor Joseph R. Julin interviewed many distinguished members of the bar, the bench, and the law faculty. The series was shown by fifty stations throughout the United States, and earned the "Gavel Award" for excellence from the American Bar Association. Another way in which University scholarship reaches the larger community is through the Institute for Continuing Legal Education, a non-profit organization co-sponsored by the University of Michigan Law School, the Wayne State University Law School, and the State Bar of Michigan. In addition to organizing programs in which faculty members, practicing attorneys, and judges conduct

seminars and discuss new developments in a field—recent programs have included "Intersections of Law and Medicine," "Franchising: Problems in an Economic Slowdown," "Student Protest and the Law," and "Environmental Law, 1970"—ICLE publishes books related to these programs. One example is *Basic Corporate Taxation* (1970) by Professor Douglas A. Kahn of the University Law School. Developing an article that had originally appeared in the *Michigan Law Review*, Kahn provides a concise explanation of the fundamental aspects of federal corporate taxation, including related business and estate planning devices, while providing the lawyer with the most recent and important changes in tax law. Through books of this kind, faculty members serve as a source of continuing education for practicing attorneys, and thereby as dispensers of change to the public at large.



For decades, legal scholars have argued about the relative values of different kinds of legal research the way mathematicians argue the virtues of pure versus applied mathematics. In 1955, the University of Michigan hosted a Conference on the Aims and Methods of Legal Research. The transcript of this conference bristles with controversy on such topics as the social significance of legal problems, research for legislation, and the role of the legal scholar. Over fifteen years have now passed, and with them, apparently, the hostility over what legal research ought to be. Doctrinal investigations continue to be published in law reviews and treatises, and continue to be relied upon in the practice of law. Reform and innovative research continue to set the model for, and occasionally be put into practice as, legislation. And empirical studies now cut across all types of legal research, providing a better idea of the current operation of law in society and a hint of directions to come. The only position on legal research that seems consistently true was taken by Dean Roscoe Pound at the dedication of the University of Michigan Law School in 1934. Pound spoke of the "organized, systematic legal research in our universities, where it can and will be carried out for its own sake in a purely scientific spirit." If it also shapes social change, enters courtrooms and Congressional chambers, and enlightens the public at large, that is probably because it so well reflects the society it serves.



The reading room of the Law Library, located in the Legal Research Building, is lighted by twenty-two hand-fashioned chandeliers and by sunlight pouring through its long, stained glass windows. It seats 450 people and is circled by alcoves containing legal research materials.

The *Research News*, published monthly by the Office of Research Administration of The University of Michigan, attempts to serve interested readers both inside and outside the academic community by reflecting the diverse forms of modern university research. Some issues survey a general area of research; some are focused on organizational units; others describe long-range undertakings; and still others provide a basic introduction to some subject. Throughout the diversity of subject and approach, however, there is a consistent attempt to interpret matters of general interest in terms of particular efforts, and to give some idea of the forms in which these efforts are expressed at one large university. Current issues of the *Research News* are distributed without charge. A complete file, dating from 1952, can be purchased on microfilm from University Microfilms, 300 North Zeeb Road, Ann Arbor, Michigan 48103. Correspondence concerning the *Research News* should be addressed to the Editorial Office, Office of Research Administration, The University of Michigan, Ann Arbor, Michigan 48105.

Donald E. Thackrey
Editor and
Director of Program Development